

No. 13-19-00486-CV

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IN THE COURT OF APPEALS FOR THE  
THIRTEENTH JUDICIAL DISTRICT OF TEXAS  
CORPUS CHRISTI-EDINBURG

FILED IN  
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**MSW Corpus Christi Landfill, Ltd.,**  
**Appellant and Cross-Appellee**  
**v.**  
**Gulley-Hurst, L.L.C.,**  
**Appellee and Cross-Appellant**

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Appeal from 117<sup>th</sup> District Court, Nueces County, Texas

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**MSW CORPUS CHRISTI LANDFILL'S REPLY BRIEF OF APPELLANT**

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**ORAL ARGUMENT REQUESTED**

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IV.  MSW did not convey its interest in the Landfill to GH; the trial court’s summary judgments apparently determining otherwise must be reversed.	
V.   If MSW does not recover its transactional loss or its lost profits, then MSW will not be adequately compensated for its one-half interest in a \$35+ Million asset over which GH assumes full control but for which GH has not paid MSW. The MSA must be rescinded and the parties restored to their pre-MSA positions.	
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## **STATEMENT IN REPLY**

The position GH advocates is that it walks away with MSW's half of a \$35+ Million asset for NOTHING. GH has been exercising total control over this Landfill since 2013, under the auspices that it has a deed to MSW's one-half interest in its possession. MSW sought a declaration that any conveyance was contingent on conditions GH did not satisfy thus MSW did not convey title, and GH filed MSW's deed of record without MSW's consent. GH never purchased MSW's interest.

MSW must be fully compensated for its one-half interest in this \$35+ Million asset. As it stands, MSW has a judgment for only \$372,484.70. GH contends even this is not acceptable, having appealed that portion of the judgment. GH cannot simply walk away with this asset, in which GH admits the parties were "joint owners." (GH Ee Br 1) Either MSW is entitled to the value of its interest, for which GH has not paid, or MSW is entitled to one-half of the profits from the going concern (a damage element the trial court wrongly refused to submit).

No one "flipped the numbers." GH attempted this argument ad nauseum at trial; the jury didn't buy it. MSW's expert, who was not challenged and whose testimony was not countered by GH, competently explained and supported his methodology and rebuffed any such suggestion. The case law similarly refutes GH's dubious theory. As argued in MSW's Appellant's Brief, cases in which both buyers and sellers breached purchase/sale agreements show the damage model is the same:

the difference between contract price and market value. Numerous authorities demonstrate that the party deprived of the asset – here MSW – is appropriately compensated with the market value minus the sales price when the purchase/sale falls through.

This case presents a highly unusual situation, in which the buyer actually took control of the asset without the seller's consent. As such, GH's attempt to strictly apply various case holdings to the facts here fails – in none of GH's cases did the buyer take control of the asset without the seller's consent after breaching the purchase agreement. As shown in MSW's Appellant's Brief, the law and the evidence properly support MSW's submitted damage model and the jury's verdict.

Under the terms of the MSA, if GH did not refinance the Ameristate loan (among other actions it likewise did not take), then GH did not purchase MSW's interest. The jury found GH did not refinance; GH has not attacked that finding. GH suggests that MSW somehow waived its right to recover, because the original lawsuit was dismissed for want of prosecution. The jury found no such waiver (CR 3163, 3166), and GH has not challenged those findings.

GH contends this was not an option contract – even though every element of an option exists in the MSA (*see* MSW's Ant Br) – because MSW was “required to convey clear title under the MSA.” But under no reading of the MSA could it be said that clear title would be conveyed without compensation. The MSA clearly

establishes any conveyance was contingent on multiple acts taken by GH: “MSW agrees to *sell* its undivided one-half interest to GH for \$7,500,000 *on the following terms....*” (PX-48 ¶ 2) (emphasis added) GH admits in its brief that any conveyance of MSW’s interest had to occur “at the same time” as those stated terms: GH’s refinance of the \$5 Million note and completion of additional purchase obligations (GH Ee Br 7). GH further admits GH’s purchase actions were “required immediately.” (id. at 8) The MSA states that “*In such event, ... MSW shall provide clear title....*” (PX-48 ¶ 2) (emphasis added) GH did not comply with the express terms of purchase it concedes existed – the “event” did not occur – and therefore GH did not exercise its option. MSW did not convey title and certainly did not sell its interest. If GH is correct that MSW did convey title, where is MSW’s compensation? MSW’s multiple claims for the mishandling of its deed, which the trial court wrongly disposed in favor of GH, must also be remanded for trial.

GH wrongly blurs the individuals’ damages (“lost credit”) with MSW’s damages in an effort to confuse the issue and suggest the jury did not find for MSW or that MSW cannot recover. The jury answered every liability and damage question in favor of MSW. The fact that the jury did not award loss of credit to the individuals (for GH’s failure to release the personal guarantees) has no relation to whether MSW is entitled to compensation for its transactional loss caused by GH’s failure to comply with the purchase contract, while assuming full control over MSW’s asset

and reaping all the benefits.

GH's contention that MSW "never had to make any payments on the loan" is a misrepresentation of the evidence and the effect of a reinstatement of the jury's verdict: the Landfill is valued at \$35.47 Million; the damage award, supported by competent evidence, divides that value in half (\$17.735 Million to MSW) then subtracts \$7.5 Million from MSW's one-half (which the parties agreed in the MSA would cover the balance due on the Ameristate note and "write off the remaining balance of the \$3.5 Million seller-financed note.")). Under the reinstated judgment, GH will be compensated for those loans.

Ironically, GH contends MSW seeks to be placed in a better position than if GH had complied with the MSA and properly purchased MSW's interest. But GH's breach of the MSA has consequences. Failure to purchase on the terms stated resulted in no purchase at all. This is why MSW did not seek specific performance, and filed a notice of lis pendens. GH's time to purchase was up. MSW held a one-half interest in a \$35 Million asset that it could have sold to another buyer.

**GH** seeks the astounding windfall: ownership of MSW's \$17+ Million interest for a mere \$373,000, plus GH's retention of every profit reaped from the business since 2013 (total at time of trial in 2019: \$3.69+ Million). That cannot, under the law or this record, be the legal, equitable, or just result. The jury agreed and rendered its verdict accordingly. The trial court should not have set aside that

verdict. Alternatively, the court should have submitted MSW's lost profits question. MSW is utterly without recovery for GH's mishandling of its interest in this Landfill.

In sum, either MSW is entitled to the value of its one-half interest in the Landfill, or it is entitled to lost profits from the going concern. The judgment simply cannot be supported in its current state. Reformation is required to reinstate the jury's transactional loss verdict. Otherwise the element should be remanded along with a remand for lost profits. Multiple of MSW's additional theories of liability should also be remanded. The trial court's pretrial, pro-GH assessment of the case was wholly rejected by the jury, which rendered a polar-opposite verdict wholly in favor of MSW. It was the jury's province, not the trial court's, to decide.

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## **ISSUES PRESENTED, RESTATED IN SUMMARY**

- I. MSW is entitled to reinstatement of the jury's \$10.235 Million verdict, as compensation for the value of its one-half interest in the Landfill, which GH failed to purchase but has wholly controlled since 2013. GH has not contested the jury's findings that it failed to timely comply with the stated purchase terms set forth in the MSA.  
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- III. This was an option contract; the trial court should have submitted MSW's option contract question. The jury found, by its answers to other questions, a failure to timely comply with the MSA's stated purchase terms. MSW's damages for GH's failure to exercise its option must be reinstated or otherwise remanded for trial.
- IV. MSW did not convey its interest in the Landfill to GH; the trial court's summary judgments apparently determining otherwise must be reversed.
- V. If MSW does not recover its transactional loss or its lost profits, then MSW will not be adequately compensated for its one-half interest in a \$35+ Million asset over which GH assumes full control but for which GH has not paid MSW. The MSA must be rescinded and the parties restored to their pre-MSA positions.
- VI. MSW's claims for GH's mishandling of MSW's deed, and wrongful acts arising from the parties' original operating agreement, must be remanded.
- VII. MSW's fraud claim must be remanded.

## **STATEMENT OF FACTS**

MSW incorporates by reference its statements of fact and challenges to GH's statements, set forth in MSW's Appellant's and Cross-Appellee's Briefs. MSW reiterates here that GH *never* obtained a refinance of the Ameristate loan; the assignment and assumption was not a refinance (GH Ee Br 10). The jury's findings in favor of MSW on both of these points (CR 3162, 3168) have never been challenged by GH.<sup>1</sup>

Most importantly here, it is a rote misstatement of the record to say that MSW's expert Allyn Needham improperly "flipped" or "switched" "the numbers," and that he did so on the instruction of MSW's counsel (GH Ee Br 12, 14). GH misleadingly takes snippets of testimony out of context and fails to provide the Court with an accurate dissertation of Needham's statements.

Indeed, Needham testified that *GH's counsel* started the false narrative by improperly doing the math in the first place (sales price minus market value) (19RR 75-76 ["No, no, that's the formula you put up there, it's not exactly the formula I followed ....;"] 77-78 ["based on *that* [GH's] equation, that is correct."]). Needham testified that under the facts of this case, the proper calculation is market value minus sales price (*id.* 76). When asked, "So what you did, actually, in your calculation was

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<sup>1</sup> Once again GH fails to provide a complete statement of the trial record and instead relies predominantly on references to the pre-trial clerk's record.

the opposite of the case law. You said you flipped it a minute ago?” Needham answered, “I disagree, because in the -- the way that I read this ..., it says ‘and,’ it doesn’t say minus in all of those opinions.” (*id.* 95) Those opinions, as GH concedes, state the damage model is “*the difference between the contract price and the property’s market value at the time of the breach.*” (See GH Ee Br at 14, quoting the applicable legal standard) Needham is correct: the opinions say “and,” they do not say “minus.” Needham additionally corrected GH’s false narrative:

Q. Okay. So lawyers have told you to flip it when -- when -- for whatever --

A. Well, first of all, we’ll stop there. I disagree. Lawyers don’t tell me what I have to do with my calculations. \*\*\*

(*id.* 97-98) He continued:

Well, I think *I would disagree with the premise* in that if I have something and I’m going to sell it, I already have the value in hand. [MSW] were willing to sell it for \$7.5 million. At the end of the day, [MSW] still had the \$17.7 million. My only argument with the calculation is that [MSW] have not been able to then offer it to anyone else, that’s where the loss comes in.

(*id.* 83) (emphasis added) Needham explained that “by breaching and with what has happened since, MSW has not had the opportunity to sell that half interest to others. ... MSW was not able to move forward to another investor and say, you want to buy this half interest.” (19RR 78-79, 89-90) “[MSW has] always had the property worth that much [\$17.735 Million], it’s just that the transaction [GH’s purchase] did not take place.” (*id.* 83) “They always had it, they still have it. I can’t tell you why

[MSW] were going to sell it for 7.5 [or why GH did not buy it for that price], but the thing is it has been, at that time was 17.7, it still was when [GH] didn't close." (*id.* 85, 86, 90 "[MSW] still had what they already had. They didn't get the *benefit* of getting out of the Gulley-Hurst deal." [emphasis added])

MSW has "not had the flexibility, the opportunity to offer that to others that half interest. That's where the argument comes in. I would be happy having the \$17.7 million realizing what the difference in the deal was. But if I did not have the opportunity to then turn around and offer it to other individuals or other investors, that's what would make me upset, that's where my calculation came from (*id.* 91, 98-99, accord 147-48, 149).<sup>2</sup> Needham reminded GH's counsel that GH still holds its \$17.735 Million half (*id.* 87).

Regarding alleged "debt service" on the \$3.5 Million seller-financed note (GH Ee Br 12), as made clear in both of MSW's briefs on file, that note was subordinated to the Ameristate loan and was not due and payable until the latter was paid off (19RR 139-142, 146-47). The Ameristate loan was never refinanced, so it still exists. Moreover, it was GH's position throughout the case (when they perceived it

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<sup>2</sup> GH's counsel went too far with his contrived "numbers-flipping" theory by trying it again while cross-examining Needham on his calculation of lost profits; Needham said, "I have no idea what you're talking about there." (19RR 128-129) Needham corrected GH's counsel: "Well, obviously, you're addressing the term I used, 'Flip', before we went to lunch and *the way that I used it in assessment 2 [transactional loss] is correct and accurate.*" (*id.* 129) (emphasis added)

beneficial) that GH wrote off the \$3.5 Million note. As Needham astutely noted, “To me, this \$3.5 million note is somewhat amorphous. It seems to -- I mean, Gulley-Hurst took it off their books, and then they subordinate, and it’s here, it’s there, it comes up, oh, you owe us this money and then it’s gone.” (*id.* 163)

## **ARGUMENT**

### **I. MSW is Entitled to Its Transactional Loss**

After conceding the legal standard that applies – “*the difference between the contract price and the property’s market value at the time of the breach*” – GH pontificates about the application of the standard without citing an applicable case or applying a proper analysis of its case holdings (GH Ee Br 14-15).

*Yazdani-Beioky v. Sharifan*, 550 S.W.3d 808, 833 (Tex. App.—Houston [14<sup>th</sup> Dist.] 2018, pet. denied) is not “remarkably similar” as GH contends (GH Ee Br 15-16). Sharifan alleged he had an oral agreement with Yazdani to sell his (Sharifan’s) 40% share in their limited partnership, which owned and operated a hotel and parking lot, for \$12.5 Million. It was a pure cash deal with no contingencies. *Id.* at 817-18. During the bench trial, Yazdani first contended Sharifan had no interest in the partnership because he forfeited it by failing to pay a capital call, otherwise his interest was reduced; Yazdani then also “denied ever having made any offer to

Sharifan to purchase his partnership interest at any price.” *Id.* at 818.<sup>3</sup> The court found a contract existed and awarded Sharifan the \$12.5 Million he contended Yazdani offered him to purchase his interest. *Id.* at 819. The appellate court held: “We conclude that the negotiated contract price for the sale of a limited-partnership interest can supply the appropriate measure of damages for a breach by the buyer *where there has been full performance by the seller....*” *Id.* at 833 (emphasis added).

*Sharifan’s* dissimilarities with this case are marked: (1) GH did not and could not contend that it had no contract with MSW; (2) this was not a cash sale, and there were multiple essential contingencies with which GH failed to comply; (3) the instant contract was for the sale of real estate, not limited partnership shares; (4) Sharifan, the seller, voluntarily conveyed his interest to Yazdani and fully intended to sell his interest at that time – MSW did *not* convey its interest to GH and did *not* intend to sell its interest at the time it transmitted its deed to GH; GH filed MSW’s deed of record without MSW’s consent and without satisfying the contingencies; and (5) MSW did not seek to force GH to perform after GH breached.

As for damages, GH quotes the opinion out of context (Ee Br 15-16), citing Yazdani’s contentions, not the holding:

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<sup>3</sup> The court, properly sitting as factfinder in a bench trial, found Yazdani “was not credible or truthful,” having categorically denied multiple facts testified to by credible witnesses, including his lawyers. *Id.* at 824-825. Here, the jury, as factfinder, found GH’s witnesses incredible and not truthful.

*Yazdani contends* that the only correct measure of Sharifan’s damages is the difference between the alleged contract price of \$12.5 million and the market value of Sharifan’s partnership interest in August 2008. If this court accepts Sharifan’s testimony that his interest was valued at \$24 million at the time of alleged breach, then this conclusively negated the existence of any damages because the difference between the contract price and the market value would be negative. *Yazdani further contends* that if this court rejects the \$24-million figure as conclusory or speculative, then there is no competent evidence establishing damages in any amount at all. *Either way, Yazdani asserts* that he is entitled to rendition of judgment in his favor.

*Id.* at 833 (emphasis added). The court made clear that ordinarily “the correct measure of damages was the difference between the market value of the stock options and the contract price at the time set for delivery,” which “makes sense where ... no delivery of stock occurred.” *Id.* at 834. But because seller Sharifan “has already relinquished his interest” with the full intent to sell, the proper measure of damages was the price the buyer agreed to pay. *Id.* The court reiterated its classification of the case as “a breach-of-contract case where the plaintiff seller’s interest already had passed to the defendant buyer per their oral purchase agreement but the seller never received any of the agreed contract price for his interest.” *Id.* at 833, n. 12.

Here, MSW had not already relinquished its interest with the full intent to sell, and did not seek performance of the agreement after GH breached. The correct measure of damages, as stated in *Sharifan*, is the difference between the market value of the Landfill and the contract price at the time set for delivery.

*Sharifan* relies on cases (which GH also references, pp. 16-17) that are inapposite here to support the holding that the contract price is the correct damage measure, recognizing “the selling party fully performed” in all of them, *id.* at 834: *Eagle Fabricators, Inc. v. Rakowitz*, 344 S.W.3d 414, 423 (Tex. App.—Houston [14th Dist.] 2011, no pet.) involved a steel erector’s suit against a steel fabricator for refusal to pay for construction work performed pursuant to their contract; in *Sacks v. Hall*, 481 S.W.3d 238, 244 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2015, pet. denied), an orthodontist sued a former patient for breach of contract for failure to fully pay for orthodontic services; and in *Synagro of Texas-CDR, Inc. v. AON Risk Servs. of Tex., Inc.*, No. 13-04-663-CV, 2007 Tex. App. LEXIS 61, at \*1 (Tex. App.—Corpus Christi-Edinburg Jan. 4, 2007, pet. denied) (mem. op.), a commercial insurance broker sued its client for breach of contract for failure to pay for replacement insurance and commissions. None of these cases has any applicability here.

The entire premise of GH’s argument, which colors its interpretation of its cited authorities, is that MSW “conveyed the property to the buyer” and no longer “retain[s] its half interest in the Landfill.” (GH Ee Br 16, 17) GH’s quotation from *Stinson v. Sneed*, 163 S.W. 989, 991 (Tex. Civ. App.—Amarillo 1914, no writ) (*id.* 17) ignores entirely that GH has assumed full control of MSW’s asset without MSW’s consent. If the seller still has control over its interest, then an increase in market value inures to the seller’s benefit because the seller can sell the property to

someone else at that new value. But here, just as MSW's expert testified at length at trial, GH took control of the asset, and MSW was unable to sell it to another buyer: "My only argument with the calculation is that they have not been able to then offer it to anyone else, that's where the loss comes in." (19RR 83, accord 91, 98-99, 147-48, 149).

GH cites *Kollmeyer v. Stewart*, No. 05-00-01787-CV, 2001 Tex. App. LEXIS 8194 (Tex. App.—Dallas Dec. 11, 2001, no pet.), *Wilkinson v. Goddard*, 278 S.W.2d 394 (Tex. Civ. App.—Waco 1955, no writ), and *Johnson v. Price*, No. C14-84-656-CV, 1985 Tex. App. LEXIS 7394 (Tex. App.—Houston [14th Dist.] Jan. 24, 1985, no writ), to support its theory that because the market value of the Landfill was higher than the contract "price," MSW cannot recover (GH Ee Br 17-18). Again, in none of those cases did the buyer abscond with the seller's property. Seller Stewart was still in control of her property when buyer Kollmeyer refused to close; seller Goddard kept his tavern when buyer Wilkinson failed to close. As for *Johnson*, on the other hand (discussed in MSW's Ant Br 53-54), the purchaser was deprived of the economic benefit of the property when the sale did not close and therefor was entitled to "the difference between the contract price and the market value of the property at the time of the breach." *Id.* at \* 2. If the market value of the property had been in excess of the contract price, "*which would provide the measure of damages,*" the buyer could have recovered (but the buyer could not prove an excess market

value). *Id.* (emphasis added). Here, MSW has been deprived of the economic benefit of its property even though the sale did not close, because GH has assumed full control. Because MSW proved the market value of the Landfill is in excess of the “contract price,” market value minus sales price is the correct measure of MSW’s damages.<sup>4</sup>

GH’s discussion of damages generally (Ee Br 19-21) fails to provide instruction in this case that, *first*, involves real estate (the damage measure for which is distinct and well-settled; GH’s cited cases are not real estate cases) and *second*, presents an unusual factual scenario. As MSW stated in its opening brief (at 61), GH’s arguments frequently attempt to fit a square peg into a round hole.

GH wrongly contends that “[b]ecause MSW would have owned no interest in the Landfill if the MSA had been fully performed, the value of the Landfill cannot be the measure of damages.” (GH Ee Br 22-23) That statement and GH’s argument cannot be reconciled with the law applicable to breach of a real estate transaction, which mandates as a component of the damage measure “the market value of the property at the time of the breach.” The value of the Landfill is absolutely a component of the measure of damages.

GH had the option to purchase MSW’s interest by a specific time on specific

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<sup>4</sup> MSW objects to GH’s accusations that its trial court damages arguments were improper or designed to be misleading, or that MSW is trying to mislead this Court (GH Ee Br 19).

terms. Having failed to timely comply with those terms, GH did not purchase MSW's interest. MSW was not required to sell. GH could not force a sale on the expired terms by wrongfully taking MSW's deed and filing it of record without MSW's consent. MSW should still be in possession and control of its asset. Instead, because of GH's malfeasance, GH is holding itself out as 100% owner of the Landfill.

GH cannot champion its alleged ownership position without compensating MSW for the value of its one-half. GH's opportunity to buy on the terms to which the parties agreed expired. GH must now pay for MSW's interest at fair market value. The damage proximately caused by GH's failure to comply with the MSA is, as the jury found, "the difference between the price to be paid by [GH] ... and the market value of the Landfill at the time of the breach of contract by [GH], minus any indebtedness owed on the Landfill by MSW: \$10,235,000.00." (CR3164) Those damages are not inapplicable as GH contends (GH Ee Br 24), for all the reasons set forth herein and in MSW's Appellant's brief. MSW's expert properly testified to the applicable measure of damages in this breached real estate purchase/sale.

GH cannot walk away with MSW's half of a \$35+ Million asset for nothing. GH's cross-appeal seeks to strip MSW of its \$373,000 jury verdict for lost opportunity cost of not having use of the money tied up in the Ameristate loan (*id.*). MSW is entitled to its lost opportunity cost, and so much more. For starters, MSW

must recover the value of its asset wrongfully taken by GH.

GH misstates MSW's position regarding damages (GH Ee Br 23). If the verdict is reinstated, then MSW will be compensated for GH's improvident actions in filing MSW's deed, holding itself out as 100% owner of the Landfill, and wholly controlling the asset since 2013. MSW will be paid for its one-half interest. If the verdict is not reinstated, the case must be remanded for a determination of damages, including lost profits from the going concern, because MSW would still be an owner of one-half: GH will not have purchased (and thus MSW will not have sold) MSW's interest.

The trial court's erroneous orders in favor of GH must be reversed and the jury's verdict in favor of MSW reinstated. Because GH concedes MSW presented "some evidence" of each component of this damage (MSW Ant Br 57-58), a jnov was improper. Tex. R. Civ. P. 301. In the alternative, this damage element can be remanded for retrial (liability being uncontested). Tex. R. App. P. 43.3, 44.1.

## **II. Alternatively, MSW is Entitled to a Remand for Lost Profits**

GH ignores MSW's clear arguments below and on appeal that (1) MSW did not convey its interest with the intent to sell, (2) GH filed MSW's deed of record without its consent and without paying MSW for its interest, and (3) the MSA stated the specific purchase terms, with which the jury found GH failed to timely comply, therefore GH cannot have purchased MSW's interest. GH has not challenged the

jury's findings. If GH did not purchase MSW's interest, then MSW still owns one-half of the Landfill. As half-owner of the going concern, MSW is entitled to half the profits. MSW's expert, who was unchallenged, presented a complete assessment of Landfill profits through the time of trial (19RR 58-70, 91-92, 121-125). The court should have submitted MSW's damage element.

GH's position – and the trial court's erroneous determination – that MSW conveyed its interest to GH, and that MSW has no other claim against GH save for breach of the MSA, has improvidently driven this case to a reversible judgment. The jury's findings, juxtaposed with the MSA, undermine any conclusion that MSW conveyed its interest to GH (notably, the jury found MSW did not wrongfully interfere with GH's attempt to refinance the Ameristate loan in 2019 “by sending letters ... asserting an ownership interest in the Landfill” [CR3171-72]). Ultimately, one of two outcomes relative MSW's status as an owner must occur: if MSW no longer owns the property, it must be paid for its one-half; if MSW still owns the property, it must be paid profits.

Notably, GH fails to mention MSW's cited case of *Ryan Mortg. Inv'rs v. Fleming-Wood*, 650 S.W.2d 928 (Tex. App.—Fort Worth 1983, writ ref'd n.r.e.) (Ant Br 52-53), in which the seller breached the contract to sell a commercial development to the buyer; the sales price was \$2,950,000; the seller's own evidence established the market value of the development was \$4,585,000 as townhomes and

\$3,100,000 as apartments. *Id.* at 931, 935. The jury awarded the buyer \$2,000,000. *Id.* at 934. Like GH, the party in control of the asset argued the party deprived of control “was not entitled to recover damages based on benefit of the bargain;” that argument was rejected and the judgment affirmed. *Id.* at 935. “The jury’s award gave [the buyer] the benefit he would have received if he had sold the property as condominiums.” *Id.* at 936 (emphasis added). Notably, the buyer also sought to recover the “reasonable rental value for the time [it] would have taken possession of Cambridge Station under the contract until the time of trial.” *Id.*, 650 S.W.2d at 935-36. Because the buyer recovered the market value-minus-price, it could not also recover lost rentals. *Id.* at 936.

Here, MSW has been deprived of its rights of ownership in the Landfill because of GH’s improvident acts. If MSW does not recover the market value-minus-price, then it is entitled to lost profits. Beyond attempting to distinguish MSW’s other cases, which properly set forth the applicable law regarding damages in a breach of contract dispute, GH presents no additional case to support its position that MSW is not entitled to lost profits (Ee Br 26-27).

### **III. The MSA Gave GH an Option to Purchase, with which GH Failed to Comply**

GH wrongly argues that “none of the obligations on MSW [in the MSA] are in any way conditional upon completion of the refinancing by Gulley-Hurst,” “MSW had an unconditional obligation to provide clear title,” and “MSW cannot now argue

that somehow the language requires that the ... \$5,000,000 Note be released and refinanced prior to the conveyance of clear title.” (Ee Br 28-29) GH’s arguments wholly misread the MSA, the terms of which could not be clearer. Further, GH’s cited cases<sup>5</sup> all stand for the proposition that some cause-and-effect is required if the buyer fails to perform, in order for the contract to qualify as an option. There is clear cause and effect here: if neither party closed a sale as of the 240<sup>th</sup> day after the MSA was executed, then the parties returned to their pre-MSA positions; there was no sale. The MSA provides:

2. Sale by MSW. *In the event that MSW fails to close the purchase* of the one-half interest owned by GH as provided above, *MSW agrees to sell* its undivided one-half interest to GH for \$7,500,000 *on the following terms: GH shall* refinance the approximately \$4,800,000 balance owed to AmeriState Bank by MSW and eliminate all personal guaranties and obligations of MSW and its guarantors for such loan and write off the remaining balance of the \$3,500,000 seller-financed note for such one-half interest for the remaining amount of the consideration. *In such event*, 120 days after the execution of this Agreement MSW shall provide clear title to GH by special warranty deed to its one-half interest *subject only to* those conditions of title accepted in the purchase of its one-half of the Landfill in September 2011, the liens in favor of AmeriState Bank securing the \$5,000,000 loan, the liens securing the \$200,000 loan originally in favor of AmeriState Bank, and any liens created or permitted by GH in its operation of the Landfill since August 2013. *GH shall* arrange for the refinancing of the AmeriState Bank loan and release of guaranties *within 120 days after the expiration of the period provided in Section 1 above.* Any title insurance required or other closing costs in connection with such refinancing *shall be the expense of GH.*

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4. Status of Lawsuit. GH and MSW agree to file a joint motion for continuance of the Lawsuit and obtain a trial setting as soon after the *expiration of 240 days* as possible. *Upon closing of the sale either under Section 1 or Section 2 above*, the parties shall file a joint motion to dismiss the Lawsuit with prejudice to the rights of the parties to refile the same in that all matters in controversy in connection with such suit shall have been compromised hereby.

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<sup>5</sup> GH never made the argument it advances here in the trial court or cited any of these cases. Tex. R. Civ. P. 166a(c).

(App. A, PX-48; 16RR 84-85, 86) (emphasis added).

The MSA is replete with contingencies, conditions, and requirements for timely action by GH before MSW was required to “sell” its interest. GH’s suggestion that MSW’s performance was not “expressly conditional” is belied by the above highlighted terms of the agreement, as well as GH’s own admissions earlier in its brief that any conveyance of MSW’s interest had to occur “at the same time” as GH’s refinance of the \$5 Million note and completion of additional purchase obligations, and that GH’s purchase actions were “required immediately.” (GH Ee Br 7, 8) GH did not act “at the same time” or “immediately” and indeed did not act in a timely manner at all, as the jury found. The MSA makes clear in multiple provisions that GH had an express period of time in which to act: 120 days (240 days from the execution of the agreement, at most); GH’s attempt to distinguish MSW’s cited authority fails (Ee Br 29-30). The MSA provides a clear penalty for GH’s failure to timely act: no purchase, no sale, no settlement, back to the lawsuit -- which is where the parties now find themselves (the jury found the dismissal for want of prosecution of the original lawsuit was not a waiver [CR3163, 3166] and GH has not attacked those findings).

The MSA gave GH an option to purchase, on specific terms, in a specific period of time. GH failed to comply with the option. That question should have been submitted to the jury. But in its absence, the jury’s answers to the breach of contract

liability questions (CR3162-66) require judgment in MSW's favor in the amount found by the jury for MSW's transactional loss. GH failed to comply with its purchase terms "as required by the MSA" but took control of the asset anyway. In the alternative, GH having failed to comply with its option, GH does not own MSW's interest, and MSW is entitled to a remand and determination of its lost profits from the going concern, in which it is an undivided one-half interest owner.

#### **IV. MSW did not Convey its Interest to GH**

The terms of the MSA, which the parties negotiated and drafted by agreement, are quoted herein repeatedly. GH admits that it had to refinance the Ameristate note and comply with the other purchase terms at the same time that MSW allegedly conveyed its interest to GH (as did its corporate representative Mike Hurst at trial and during his deposition, shown at trial [18RR 26-29, 30, 35-37, 107; e.g. CR1650-51 [recognizing *GH*'s provision of clear title "would have been done at closing;" MSW's provision was the same). Under the express terms of the MSA, the conveyance was conditional, that is, "A conveyance that is based on the happening of an event, usu. payment for the property...." BLACK'S LAW DICTIONARY 407 (10<sup>th</sup> ed. 2014).<sup>6</sup> MSW made this clear in a letter to GH in September 2015 (CR1664-65: "The [MSA] sets forth two conditions precedent to

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<sup>6</sup> An "absolute conveyance" is "a conveyance in which a right or property is transferred to another free of conditions or qualifications." BLACK'S LAW DICTIONARY 407 (10<sup>th</sup> ed. 2014). The terms of the MSA do not constitute an absolute conveyance.

the obligation of MSW to sell its undivided one-half interest in the Landfill to GH;” “these conditions have not been met;” the deed should be held in escrow until GH completes the MSA terms of purchase). The deed states that the consideration therefore is “pursuant to a mediated settlement agreement” in a “pending” case (CR1683, accord 1687). Fully aware of MSW’s position that it was not selling its interest to GH at that time, GH filed the deed of record anyway.

MSW incorporates here by reference the detailed trial testimony of Tom Noons and Shane Shoulders, as well as Noons’ deposition and affidavit testimony, which make clear that it was not MSW’s intention to simply donate its one-half interest in the Landfill to GH simply because a deed was provided pursuant to one conditional term in the MSA (e.g., CR 1642-44). GH was required to comply with its purchase conditions, otherwise there was no sale. Mike Hurst knew this, and testified to the same in his deposition.

“Sale” is defined as “The transfer of property or title for a price.” BLACK’S LAW DICTIONARY 1537 (10<sup>th</sup> ed. 2014). MSW never received the price stated in the contract. The MSA further expressly contemplates a “closing of the sale under ... Section 2 [GH’s option to purchase].” A “closing” is “The final meeting between the parties to a transaction, at which the transaction is consummated; esp. in real estate, the final transaction between the buyer and seller, whereby the conveyance documents are concluded and the money and property transferred.” *Id.*, at 311.

There was no closing in this case; no conveyance documents were concluded; no money or property was transferred. Section 2, under which MSW would “sell” its interest, does not stop with MSW simply providing a deed to GH. The MSA does not contemplate an absolute conveyance.

The terms of the MSA, which MSW participated in drafting, evidence MSW’s lack of intent to convey its interest until all purchase terms were completed. GH cannot legitimately contend that this was not a conditional conveyance.

If GH is correct that MSW actually “conveyed its interest” unconditionally, such that MSW somehow “sold” its interest, then MSW must be compensated, because GH failed to pay. MSW proved the amount of its transactional loss through its expert Needham. GH lost its right to “purchase” MSW’s interest on the MSA’s terms and must now pay fair market value minus sales price (which will compensate GH for the outstanding loans). A party in breach cannot enforce a contract, and the jury found GH breached, therefore GH cannot enforce the contract. *Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 196 (Tex. 2004).

Alternatively, if MSW did not “convey its interest,” then MSW is entitled to its share of profits from the going concern.

Under any scenario, GH cannot simply take MSW’s \$17.5 Million asset for \$373,000. MSW stands on its prior briefing on this issue.

## V. Rescission

GH's incessant contention that it is the owner of MSW's half interest in this Landfill, but that MSW is entitled to no compensation whatsoever, leads to only one result: rescission of the MSA. GH's attempt to limit rescission to incidents of fraud and mistake (Ee Br 35, 38) is erroneous. First, rescission is also appropriate "for some other reason to avoid unjust enrichment." *Humphrey v. Camelot Retirement Cmty.*, 893 S.W.2d 55, 59 (Tex. App.—Corpus Christi 1994, no writ). GH will be hugely unjustly enriched if MSW is not compensated for its half interest in the Landfill, which GH has taken without payment, and the MSA is not rescinded.

Second, when a material part of the contract is breached, or there is a partial breach that goes to the essence of the contract (as to both and as applicable here: non-performance of a settlement agreement, or failure to perform when time was of the essence), rescission is proper. *Humphrey*, 893 S.W.2d at 59; *Mustang Pipeline*, 134 S.W.3d at 196; *Kupersmith v. Weitz*, No. 14-05-00167-CV, 2006 Tex. App. LEXIS 10136, \*\* 13-14 (Tex. App.—Houston [14th Dist.] Nov. 28, 2006, no pet.).

GH did default first (contrary to Ee Br 35-36), thus MSW was relieved of its obligation to sell. MSW refused any benefit from the contract after GH breached, attempted to return the \$3.5 Million Note (which GH refused), then filed suit seeking a declaration of its rights and a rescission of the MSA (see MSW's Ant Br, contrary to Ee Br 36). MSW was harmed, not benefited, by the MSA because GH

took MSW's deed under the auspices that this was "required" by the MSA's terms, then filed the deed of record without MSW's consent, holding itself out as the 100% owner and refusing to comply with the MSA purchase terms. MSW has nothing to show for this. It is still encumbered by the \$5 Million note. Payments made by GH on that note will be fully restored and compensated through the jury's verdict and MSW's proposed judgment. GH continues to twist and contrive the facts and the terms of the MSA to achieve a wholly illegal and inequitable result.

MSW has no adequate remedy at law if it is not compensated for its transactional loss or its share of profits. Rescission would be required.

## **VI. Claims Regarding the Parties' Operating Agreement and GH's Mishandling of MSW's Deed**

GH argued in its motion for summary judgment, and the trial court found, that (1) MSW's operating agreement claims were settled with the MSA and GH complied with the MSA, so those claims were moot; and (2) MSW was required to provide a deed to GH pursuant to the terms of MSA, so GH could file it of record and hold itself out as 100% owner, and MSW was not entitled to the deed's return (CR56-57, 64-68, 312-13; 5RR 7, 50-52). Tex. R. Civ. P. 166a(c). GH lodged the same defensive theories to all of MSW's claims, thus MSW briefed and refuted them in detail to support multiple issues, with case law and extensive testimony (including from GH's own witnesses) in support; MSW incorporated that briefing when addressing the ancillary claims (Ant Brief 76-77). For all the reasons argued

in MSW's Appellant's Brief and herein, (1) GH wrongfully recorded MSW's deed without MSW's consent then held itself out as 100% owner of the Landfill; (2) if the MSA is rescinded, the parties must necessarily return to the trial court to litigate their operating agreement claims. The trial court's improvident summary judgments must be reversed.

## **VII. Fraud**

MSW's Appellant's Brief extensively discusses the summary judgment evidence and applicable case law and refutes the trial court's legal basis for rejecting MSW's fraud claims. MSW stands on that briefing. GH again twists or misstates the evidence and the law to support its unfounded position, ignoring that it absconded with MSW's one-half interest in this asset after fraudulently inducing MSW to forego its own opportunity to obtain GH's half. GH's argument that MSW had to purchase GH's interest to recover is nonsensical and has no application to the facts here.

As co-owners of and partners in the operation of the Landfill *until a closing that did not occur* (CR1713, 1717 [Operating Agreement: MSW is "Owner," GH is "Operator;" each owns "undivided 50% interest in such property;"] MSA: PX-48 ¶ 2; CR1761-62 [after GH purported to terminate the operating agreement, GH acknowledged MSW was still entitled to net proceeds]), MSW and GH had both a formal and an informal relationship during MSW's 120-day purchase option. This

triggered GH's duty to disclose accurate financial information and the fact that Progressive was intently considering a purchase of the Landfill, among other information that, if made known to MSW, would have changed MSW's position regarding its purchase option.

Contrary to GH's assertions, the Progressive negotiations were ongoing before and during MSW's option period (CR1193-1205 [July 13, 2015: GH meets with Progressive about either forming a partnership or selling the Landfill to Progressive], 1703-1707 [August 2, 2015 internal Progressive memo discussing July 2015 trip for "business development opportunities in Corpus Christi," to meet with "a few key acquisition candidates," including the "Gulley Hurst Landfill" and noting "*in the past, I've had several meetings* with Phil ... Mike...and Bryan;"] 1709-1710 [Progressive "Acquisition Follow Up Action Plan" for "Gulley Hurst Landfill"]; 1758-60; accord CR1807-1816).

Pursuant to the terms of the MSA, MSW could not have obtained a capital partner or a loan to purchase GH's interest without financial information (CR2699, 2882). GH had also previously promised financial information to MSW (CR1739-40 ["monthly financial reports will be generated"]), then refused to provide it despite MSW's repeated requests (e.g. CR1797-98). Contrary to GH's contentions, MSW presented evidence that "We requested financial records from [GH] and never got them .... many times after the signing of [the MSA]," including within the first

30 days of MSW's purchase option (CR2694-97, 2704, 2705).

GH further made multiple financial representations to MSW that were incorrect when made or proved to be incorrect later, thereby requiring GH to correct its misstatements (e.g., *compare* CR1735-38, 1799 [no money to pay loan or salaries] *with* CR1787-89 [\$100K/month net], 1794-96 [doubled 2015 pro formas and 2016 projections]). MSW had no ability to learn the truth; GH was in full control of the asset and all information. On numerous grounds, GH had a duty to disclose.

GH concedes, "where one is induced by fraud to enter into a contract to his loss, the measure of his damages is the difference between the value of what he parted with and what he received under the contract." (Ee Br 44-45) MSW entered into the MSA with GH and, because of GH's fraud, was induced not to purchase GH's interest, after which GH absconded with MSW's interest, valued at \$17.775 Million. MSW is entitled to compensation.

For all the reasons the jury returned its verdict in favor of MSW on every question asked, GH must not be permitted to escape liability for its repeated acts of fraudulent and deceitful conduct committed throughout its relationship with MSW, even while the parties attempted to part ways. From beginning to end, GH violated MSW's rights, resulting in substantial injury. GH's attempt to have an answer for everything did not work with the jury, and should not work here.

MSW's fraud claims must be remanded for trial.

## **PRAYER**

MSW prays for all the relief set forth in its Appellant's and Cross-Appellee's Briefs, and further prays (strictly in the alternative) for a remand of its transactional loss damages. MSW prays for all further relief to which it is entitled.

Respectfully submitted,

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### **CERTIFICATE OF COMPLIANCE**

The undersigned certifies, pursuant to TEX. R. APP. P. 9.4(i)(2)(C), that this computer-generated brief is 7,376 words long according to the word count of the computer program used to prepare this document (Microsoft Office Word 2010), from the Statement in Reply through the end of the Prayer (not including Issues Presented, Restated). Typeface font is 14-point in the body and 13-point in the footnotes.

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The undersigned hereby certifies that the foregoing Brief was served on counsel for the Appellee, as designated below, on this the 20<sup>th</sup> day of January, 2021, by tex.gov electronic filing service:

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